## Tort Law CP

### 1NC

#### Counterplan text: The United States federal government should give standing to litigants with claims against perpetrators of hate speech.

Delgado 82 [Richard Delgado (John J. Sparkman Chair of Law at University of Alabama), "Words that Wound: A Tort Action for Racial Insults, Epithets, fnd Name-Calling," Harvard Civil Rights-Civil Liberties Law Review, 1982] AZ

Next, the Article considered current legal protection from racial insults. It revealed that although plaintiffs have prevailed in actions based substantially on racial insults, the doctrines under which these plaintiffs sued have inherent limitations which ensure that many victims of racial insults will be unable to recover. Finally, objections to an independent tort for racial insults were considered, and it was concluded that these objections would not preclude the tort. The Article noted that the objections have not been squarely addressed in any case, which may indicate that they have not been considered substantial by courts and practicing lawyers. An independent tort for racial slurs would protect the interests of personality and equal citizenship that are part of our highest political traditions and moral values, thereby affirming the right of all citizens to lead their lives free from attacks on their dignity and psychological integrity. It is an avenue of redress that deserves explicit judicial recognition.

#### The CP solves – creates a culture with less racism

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It is, of course, impossible to predict the degree of deterrence a cause of action in tort would create. However, as Professor van den Berghe has written, "for most people living in racist societies racial prejudice is merely a special kind of convenient rationalization for rewarding behavior."83 In other words, in racist societies "most members of the dominant group will exhibit both prejudice and discrimination,"84 but only in conforming to social norms.85 Thus, "[W]hen social pressures and rewards for racism are absent, racial bigotry is more likely to be restricted to people for whom prejudice fulfills a psychological 'need.' In such a tolerant milieu prejudiced persons may even refrain from discriminating behavior to escape social disapproval."8 Increasing the cost of racial insults thus would certainly decrease their frequency. Laws will never prevent violations altogether, but they will deter "whoever is deterrable."87 Because most citizens comply with legal rules, and this compliance in turn "reinforce[s] their own sentiments toward conformity,"88 a tort action for racial insults would discourage such harmful activity through the teaching function of the law.89 The establishment of a legal norm "creates a public conscience and a standard for expected behavior that check overt signs of prejudice."0 Legislation aims first at controlling only the acts that express undesired attitudes. But "when expression changes, thoughts too in the long run are likely to fall into line."'" "Laws ... restrain the middle range of mortals who need them as a mentor in molding their habits."92 Thus, "If we create institutional arrangements in which exploitative behaviors are no longer reinforced, we will then succeed in changing attitudes [that underlie these behaviors]. ' Because racial attitudes of white Americans "typically follow rather than precede actual institutional [or legal] alteration,"94 a tort for racial slurs is a promising vehicle for the eradication of racism.

### A2 Too subjective

#### It's not that hard – psych. studies can determine costs on case-by-case basis – other torts prove

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One objection usually raised to torts that protect emotional-being is that the intangible and highly subjective interests invaded are difficult to measure and prove.201 This objection has been rejected as applied to the tort of invasion of privacy, 202 however, and is rapidly being surmounted in the case of intentional infliction of emotional distress. 2°3 Behavior that injures a person's interest in repose and psychological well-being 2 4 is now generally actionable despite the difficulties of measuring damages. Moreover, a tort for racial insults contains an indisputable element of harm, the affront to dignity.205 Professor Michelman and others have argued that the intangible quality of novel interests should not, by itself, preclude valuing them for purposes of compensation.2 Juries always can assign a value to such interests and their infringement. 27 Alternatively, legislatures can set nominal damages to be recovered for the affront to dignity. 28 Of course, the law does not compensate for every inconvenience, bumped elbow, jostled shoulder, or offended ear; against many of life's minor misfortunes a "toughening of the mental hide" is the best remedy.201 Not every reference to a person's race or color is insulting, nor is every insult addressed to a minority person a racial insult. The cause of action suggested here is limited to language intended to demean by reference to race, which is understood as demeaning by reference to race, and which a reasonable person would recognize as a racial insult. 21 0 The psychological or emotional harm alleged in such cases can be proved in the same manner as in other torts that protect psychological well-being.21' Expert testimony can be presented to substantiate the claim. Although such harms are to the mind and emotions, the harmful effects of racial speech have been amply studied and documented.

### A2 hard to apportion damages

#### punishment can be apportioned on case-by-case basis – financial/emotional harm can be estimated

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A second potential objection to a tort for racial insults is the difficulty of apportioning damages. Of course, if proof of directly related emotional or psychological distress is produced, a defendant should be liable for this and any other reasonably foreseeable damages, such as medical expenses or loss of income. Absent these more tangible harms, juries should be free to set damages, within reasonable limits, in order to deter other wrongdoers. And because racial insults are almost always intentional and malicious, punitive damages may often be appropriate. 21 3 Even if the victim proves that the defendant's conduct caused the injury, the defendant may be able to show that the wrongful act, if committed in isolation, would have produced no harm. In other words, the defendant may assert that his or her conduct was only harmful because prior acts of racism rendered the plaintiff vulnerable to racial slurs. Such an assertion need not preclude liability, however, because tort law is reluctant to permit defendants to escape liability simply because other factors played a part in producing the plaintiff's injury. 214 Of the variety of approaches to apportioning damages, two would be relevant to a tort for racial insults. The first approach is to discount the harm to the victim attributable to the earlier actors and to require the present defendant to pay only for any additional harm.2S Dean Prosser gives the example of a physician who negligently inflicts further injury on a patient injured by the defendant; although the defendant "may be" liable for the subsequent injury, the physician would never be liable for the acts of the defendant. 216 In the case of a racial insult, if the plaintiff's psychological and financial well-being has been damaged by earlier acts of racism, the present defendant would be required to account only for the incremental harm. The second approach may be applied when the defendant has acted in concert with others to injure the victim. 2 7 The theory of this approach is that the actors, "joint tortfeasors" under the common law, are each a part of a single enterprise, and thus the resulting harm is indivisible. This approach is relevant to a tort for racial insults because the maker of a racial slur necessarily calls upon the entire history of slavery and racial discrimination in this country in order to injure the victim. Thus the defendant is, in effect, a joint tortfeasor along with all others, past and present, who have perpetuated racism. Accordingly, the defendant should be liable for the full extent of the injury caused by the racial insult. The real problem lurking within the issue of apportioning damages is the question of the plaintiffs susceptibility to racial insults. A defendant could argue that his or her own contribution to the injury was small compared to the overall effect of racism on the plaintiff or that the racial insult could have caused no damage because minority group members are or should be inured to such treatment. Further, the defendant could point to the circumstance that the "eggshell skull" rule,218 which states that a wrongdoer is liable for damages attributable to the plaintiffs peculiar susceptibility even if this susceptibility was not apparent to the wrongdoer, is not followed in intentional infliction of emotional distress cases. 219 The counterarguments, however, are more persuasive. That a defendant takes advantage of a plaintiff already harmed by earlier victimization makes the act more, not less, reprehensible; a contrary rule would imply that racial minorities are "fair game" for further abuse merely because previously they have been the object of similar abuse. Further, because a person's race is usually obvious, the maker of a racial insult is exploiting an apparent susceptibility rather than causing an unforeseeable injury, as in the eggshell skull cases. Such an exploitation creates liability even under the doctrine of intentional infliction of emotional distress which recognizes that the "extreme and outrageous" character of the defendant's conduct may be supplied by the defendant's knowledge that the plaintiff is peculiarly susceptible to emotional distress.220 Surprisingly, only two courts have addressed the problem of apportioning damages in racial insult cases. In Alcorn, 2' the court stated in a footnote, "[We cannot accept defendants' contention that plaintiff, as a truck driver must have become accustomed to such abusive language. Plaintiffs own susceptibility to racial slurs and other discriminatory conduct is a question for the trier of fact, and cannot be determined on demurrer."2m In Contreras,223 the court quoted this language with approval, adding, "It is for the trier of fact to determine, taking into account changing social conditions and plaintiffs own susceptibility, whether the particular conduct was sufficient to constitute extreme outrage.""24 That this issue has arisen in so few cases may suggest that once the liability of the defendants in racial insult cases is proved, the courts will not intervene to deny or reduce recovery because of the problem of apportioning damages.

### A2 Court Clog

#### not distinct from past civil tort – inconvenience of tort deters fraud

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Because a tort for racial insults, like the other torts that protect psychological well-being, would present complex problems of proof of causation and of damages, it will face the objection that it would encourage fraudulent claims and generate a flood of litigation. 2 2 In some jurisdictions, the fear of fraudulent claims is reflected in a rule that denies relief to plaintiffs who suffer no physical harm. 6 Apparently, these jurisdictions believe that physical injuries are more easily proved and less easily feigned.227 Whatever its value in other contexts, this limitation is unnecessary in actions for racial insults. If racial invective is aimed at a victim, an infringement of the plaintiffs dignity, at the least, has occurred. Moreover, even if occasional plaintiffs win recoveries based on nonexistent damages, there is no reason to assume that these results would be erroneous more often than is the case in other types of civil litigation. At any rate, both correct and erroneous results would deter future offenses and thus protect the rights of others who cannot or will not seek redress.228 The specter of a "flood of litigation" was also raised, and ultimately rejected, 229 in connection with the torts of invasion of privacy and intentional infliction of emotional distress. Empirical studies show that the volume of litigation in response to the judicial recognition of new torts has not been overwhelming. 30 Moreover, the inconvenience and expense of a lawsuit will adequately deter frivolous or fraudulent claims. It is the role of courts to redress wrongs even at the risk of an increase in judicial business. A "flood of litigation," therefore, would suggest that the courts were performing their function of placing the cost of the harm on the perpetrator. In addition, arguments based on a flood of litigation are most persuasive when adequate nonjudicial remedies are available. But because a tort for racial slurs implicates speech, and thus requires interest-balancing under the first amendment, it may not be possible to rely on nonjudicial forums. 231